No. 73-1152

In the Supreme Court of the United States

OCTOBER TERM, 1973

FOX RIVER PATTERN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Wallace Corp. v. *National Labor Relations Board*, 323 U.S. 248 8, 9

Statute and regulation:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) 2, 3
Section 8(a)(3) 2, 3
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is not yet officially reported. The Board's decision and order (Pet. App. A12-A51) are reported at 199 NLRB No. 12.

JURISDICTION

The judgment of the court of appeals (Pet. App. A9-A10) was entered on November 19, 1973. On

December 18, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to January 25, 1974 (Pet. App. A57), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board's Regional Director properly withdrew approval of a settlement agreement and issued an unfair labor practice complaint.

2. Whether the Board properly issued a bargaining order as a remedy for the unfair labor practices found.

STATUTE AND RULES INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations and Statements of Procedure are set forth at Pet. App. A58-A60. Also relevant are the following sections of the Act:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. The Board Proceeding

1. The Company—which manufactures patterns, castings, and molds—and the Union were parties to a collective bargaining agreement covering the Company's pattern makers. On February 26, 1971, about five weeks before the agreement was due to expire, the Union requested negotiations for a new agreement (Pet. App. A16-A17). Thereafter, from March through June 1971, the Company engaged in the following conduct which the Board, in the present proceeding, found violated Section 8(a)(1), (3) and (5) of the Act: [1]

The Company told employees and union representatives, who were attempting to negotiate a new agreement, that it no longer wanted to operate with a union agreement and that, if it were forced to, it would not be able to provide work for the unionized employees (Pet. App. A25-A26, A32-A33, A35-A36; A. 98-99, 164-166, 242-243).[2] It offered stock in the Company to employees on the condition that they re-

[1] Petitioner does not dispute these findings here.

[2] "A." references are to the appendix in the court of appeals.

sign from the Union, which offer at least one employee accepted (Pet. App. A26, A35; A. 100-101). It discontinued payments to the Union Welfare and Pension Fund, while informing an employee that it was prepared to set up its own fund if the employees quit the Union (Pet. App. A26; A. 101). It attempted to bargain with its employees individually, informing them if there were no union the Company would "give them something comparable which everyone would be satisfied with" (Pet. App. A27-A28, A30, A37; A. 104-106, 246-252); and it discharged employee Lambert because he refused to quit the Union and accede to the terms proposed by the Company in individual bargaining (Pet. App. A28, A39-A40; A. 106-108). Finally, the Company engaged in "surface bargaining" with the Union with no intent to reach an agreement (Pet. App. A36).

On July 27, 1971, employee John Schmidt filed a petition with the Board's Regional Director to decertify the Union as bargaining representative of the employees—Case No. 13-RD-819 (Pet. A17). On August 2 and September 29, the Union filed unfair labor practice charges respecting the Company conduct outlined above. On October 20, prior to the issuance of a complaint, the Company and the Union entered into an informal settlement agreement of the pending charges that was approved by the Board's Regional Director (Pet. App. A17, A52-A59).

In the settlement agreement, the Company, while denying the commission of any unfair labor practices, agreed to refrain from the conduct with which it was

charged (Pet. App. A52, A55-A56). The agreement further provided that the Company would make whole employee Lambert for the earnings he lost as a result of alleged discrimination, begin making payments to the Union's Welfare and Pension Fund, make up unpaid contributions to the Fund, and post notices (Pet. App. A52-A53). Finally, the agreement provided that the Company would bargain collectively with the Union, upon request, provided:

> the dismissal of the petition in Case No. 13-RD-819 is either not appealed, or if appealed, is sustained by the Board and no valid question concerning representation exists * * *. [Pet. App. A55-A56].

The following day, October 21, the Regional Director dismissed the petition in Case No. 13-RD-819 (Pet. App. A18). On October 29, employee Schmidt appealed the dismissal to the Board (*ibid.*). On November 23, the Board remanded the matter to the Regional Director "for further appropriate action, to wit, either process the instant petition or proceed to a definitive disposition of the refusal to bargain charge in [the instant unfair labor practice case]" (Pet. App. A18; A. 32). On December 30, the Acting Regional Director withdrew approval of the settlement agreement and issued an unfair labor practice complaint on the Union's charges (Pet. App. A18-A19; A. 33, 40-44).

2. On January 21, 1972, the Company filed a motion to dismiss the complaint on the ground that the

settlement agreement disposed of all matters in issue, that no new unfair labor practices had been alleged, and that the decertification petitions negated any obligation to bargain with the Union (Pet. App. A15, A16; A. 45).[3] The Board, upholding the Trial Examiner, refused to dismiss the complaint.

The Board rejected petitioner's contention that, absent new unfair labor practices, the settlement could not be abrogated.

> The design and the desirability of a settlement agreement is to lay disputed matters to rest * * *. [I]t is to restore, as effectively and expeditiously as possible, the labor peace which it is the purpose of the Act to achieve. Where the

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[3] While Schmidt's appeal from the dismissal of the decertification petition was pending before the Board, the Company paid employee Lambert his lost earnings, made up its unpaid contributions to the Union Welfare and Pension Fund, and posted the notices required by the settlement agreement (Pet. App. A18). However, since there had been no resolution of the decertification petition, as provided in the settlement agreement, no bargaining negotiations were instituted (*ibid.*). After the Regional Director issued the instant complaint, employee Schmidt filed a second petition to decertify the Union (Pet. App. A19). On January 26, 1972, the Regional Director dismissed the two decertification petitions, finding that, since the instant unfair labor practice complaint had issued, no question concerning representation existed (Pet. App. A19). The dismissals were appealed to the Board, which sustained the Regional Director's action shortly before the hearing in the instant case opened (Pet. App. A19; A. 31). At the hearing, the Union stated its desire to abide by the spirit of the settlement agreement and commence bargaining with the Company, but the Company took the position that it was no longer obligated to bargain with the Union (Pet. App. A19).

> settlement agreement achieves this end, it would be a disservice to the parties involved and to the policies of the Act to set aside a settlement agreement and resuscitate a dispute which has already been laid to rest. But this is true only where the dispute has been effectively laid to rest. Where, because of new and independent unfair labor practices, or for other reasons, the settlement agreement "has failed its purpose" *Jackson Manufacturing Company*, [129 NLRB 460], there is no estoppel to further Board proceedings. *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248, 254 (1944). [Footnote omitted.] [Pet. App. A20-A21.]

The Board concluded that "the settlement agreement here has failed of its purpose" (Pet. App. A21):

> [O]n the critical issue of [the Company's] alleged refusal to bargain, the agreement, for reasons beyond the control of the parties, could not be consumated * * *. Respondent conditioned its willingness to bargain upon final dismissal of the pending decertification petition. The face of the settlement agreement contemplated the dismissal of the decertification petition or, alternatively, the processing of that petition. If the Board, on appeal, sustained the Regional Director's dismissal of the petition, Respondent would have been obligated to bargain under the terms of the settlement agreement. If the Board, on the other hand, reversed the Regional Director, the decertification petition would have been processed and the question concerning representation duly resolved. The Board did neither and, instead, remanded the matter to the Regional

> Director. * * * [T]he Board's action left the critical question concerning representation which lay at the heart of this controversy unresolved and, to that extent, frustrated the scheme of the settlement agreement * * *. [Pet. App. A21-A22.]

The Board held that the Company had engaged in the unfair labor practices noted above. It entered a remedial order, which required the Company, *inter alia*, to bargain with the Union (Pet. App A48). In issuing a bargaining order, the Board rejected the Company's contention that an election should be held to determine the Union's majority status. The Board pointed out (Pet. App. A44):

> The majority status of the Union on May 1 was undisputed and the first indication that the Union's majority may have been dissipated emerged with the filing of the decertification petition in Case No. 13-RD-819 on or about July 27, 1971, long after the unfair labor practices occurred. The law does not contemplate that Respondent can profit from his own misconduct in this way * * *. [Pet. App. A44.][4]

B. The Court of Appeals Decision

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A8). The court (with one judge dissenting) concluded that *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, "clearly authorizes the Board to disavow a settle-

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[4] The Board further found that, in any event, the Company's "pattern of conduct would preclude the likelihood of thereafter holding a fair election" (Pet. App. A43).

ment which would frustrate the purposes of the Act" [footnote omitted] (Pet. App. A5). The court further concluded that a bargaining order was appropriate since the Union was an incumbent which had "the unquestioned authority to represent the unit employees" at the time "the company's refusal to bargain occurred" (Pet. App. A7).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 6-9), the Board's power to reject a settlement agreement is not limited to the situation where subsequent unfair labor practices occur. This Court has recognized that, while "the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it," it "has consistently gone behind such agreement * * * where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice" (footnotes omitted). *The Wallace Corp* v. *National Labor Relations Board*, 323 U.S. 248, 254-255.

The settlement agreement did not resolve all of the issues between the parties; indeed, it did not bind all of those interested in the dispute. The agreement was between the Company and the Union and the Company's obligation to bargain was expressly conditioned on dismissal of the decertification petition. Employee Schmidt who filed the decertification petition was not a party to the settlement agreement.

An employee filing a decertification petition is entitled to have the petition processed unless prior unfair labor practices preclude the holding of a fair election. As the court of appeals held, "* * * certainly, a settlement between the Company and the Union should not foreclose a valid attack on the Union's representative status" (Pet. App. A6). Thus, on the Board's order of remand the Regional Director was confronted with two choices: "either to abide by the settlement and process the decertification petition or else to withdraw approval of the settlement and process the complaint" (Pet. App. A6).

The Director, finding that the Company's prior unfair labor practices were such as to preclude the raising of a valid question of representation and that the Company was still refusing to bargain with the Union, properly adopted the latter course. To permit the Company, in these circumstances, to avoid its obligation to bargain with the Union simply because the Director neglected to dismiss the decertification petition before he withdrew his approval of the settlement and issued a complaint,[5] would be to exalt form over substance.[6]

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[5] The decertification petition was dismissed before the opening of the Board hearing (n. 3, *supra*).

[6] Contrary to petitioner's contention (Pet. 6), this is not the first time the Board has withdrawn a settlement agreement where there have been no subsequent unfair labor practices. See, *e.g.*, *International Photographers of the Motion Picture Industries, Local 659*, 197 NLRB No. 134, 81 LRRM

In effect, the settlement agreement would have permitted the Company to isolate the unfair labor practices from the representation issue. Notwithstanding that it had engaged in practices which the Board subsequently found precluded a fair election, the Company would have been free to challenge the union's majority status. The Company attempted to accomplish precisely that in filing a memorandum in support of the appeal of the dismissal of the decertification petition. Such a result is directly contrary to the Board's blocking charge rule, which precludes processing of a decertification petition where a meritorious unfair labor practice charge has been filed (Pet. App. A3, n.3). The Regional Director was thus correct in setting aside the settlement agreement. See *Big Three Industries, Inc.*, 201 NLRB No. 76, 82 LRRM 1411.

1223, enforced, 477 F. 2d 450 (C.A. 9), certiorari denied, January 21, 1974, No. 73-494.

The cases petitioner cites (Pet. 6) are inapposite. *Rogers Manufacturing Co.* v. *National Labor Relations Board*, 486 F. 2d 644, 646-647 (C.A. 6), *Lincoln Bearing Co.* v. *National Labor Relations Board*, 311 F. 2d 48, 50 (C.A. 6), and *Jackson Mfg. Co.*, 129 NLRB 460, 462, involved the question whether subsequent unfair labor practices had been committed which would justify setting aside an otherwise effective settlement agreement. *National Labor Relations Board* v. *Bangor Plastics, Inc.*, 392 F. 2d 772, 775 (C.A. 6), involved the question whether a party violates a settlement agreement by posting a separate notice, adjacent to the notice required by the agreement, stating that it had complied only to avoid litigation. *United Dairy Co.*, 146 NLRB 187, 189, involved the issue whether a charging party who did not join in a settlement, but who did not take a timely appeal to the Board, could subsequently challenge the settlement.

2. There is no substance to petitioner's further contention (Pet. 9-10) that, under the principles enunciated in *Gissel Packing Co.* v. *National Labor Relations Board*, 395 U.S. 575, a bargaining order could not properly be issued without a finding that a fair election could not be held. *Gissel* holds that an employer may properly insist that a union which has just organized his employees establish its majority through a Board election, unless the employer, by his own misconduct, has precluded the holding of a fair election. The principle is not applicable where, as here, the employer seeks to withdraw recognition from a union which it has previously recognized as the employees' representative. For, in that situation, the union is not required to establish its majority status; that status is presumed unless the employer can establish a reasonable and "good faith" basis for believing that the union has lost its majority. See, *e.g.*, *National Labor Relations Board* v. *A. W. Thompson, Inc.*, 449 F. 2d 1333, 1337 (C.A. 5), certiorari denied, 405 U.S. 1065; *National Labor Relations Board* v. *Patent Trader, Inc.*, 426 F. 2d 791 (C.A. 2), reversing, *en banc*, in relevant part, 415 F. 2d 190 (C.A. 2).

But even if *Gissel* were applicable, it was satisfied here. The Examiner found that the Company's unfair labor practices "would preclude the likelihood of thereafter holding a fair election" (Pet. App. A43). This conclusion was fully justified, since the Company's unfair labor practices included discharging an employee who refused to foreswear union allegiance,

and threatening a dimunition of work for unionized employees.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In *Daisy's Originals Inc. of Miami* v. *National Labor Relations Board*, 468 F. 2d 493 (C.A. 5) (Pet. 9), unlike here, the court found that the company's Section 8(a)(1) violations were not the genesis of the employees' abandonment of the union and had a minimal effect on the employees' union support (*id.* at 502, 503).

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